No. 84415

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF THE LIQUIDATION OF PROFESSIONAL MEDICAL INSURANCE CO. AND PROFESSIONAL MUTUAL INSURANCE CO. RISK RETENTION GROUP: ARNOLD J. WOLF, D.P.M., ARTHUR AXELBANK, M.D., AND JONATHAN E. KLEIN, M.D.

Appellants,

v.

A.W. MCPHERSON, DEPUTY DIRECTOR, MISSOURI DEPARTMENT OF INSURANCE,

Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Lee E. Wells

BRIEF AMICUS CURIAE BY CORPORATE INSURANCE CONSULTANTS, INC. AND GLENN JOURDON

James P. Dalton
314 East High Street
Jefferson City, Missouri 65101
(573) 634-3411/(573) 634-8818 fax

R. Kent Sellers #29005
LATHROP & GAGE L.C.
2345 Grand Boulevard
Kansas City, Missouri 64108
(816) 292-2000/(816) 292-2001 fax

ATTORNEYS FOR CORPORATE INSURANCE CONSULTANTS, INC. AND GLENN JOURDON

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INTRODUCTION

This appeal arises out of the ongoing liquidation of Professional Medical Insurance Company ("ProMed") and Professional Mutual Insurance Company Risk Retention Group ("RRG"). ProMed is a stock insurance company. Corporate Insurance Consultants, Inc. ("CIC") is its principal stockholder, with the remainder of the stock held by an employee stock ownership plan and its employee participants (collectively, the "ESOP"). L.F. 1-2.[1] Glenn Jourdon ("Jourdon"), a former executive with ProMed and RRG, is one of the ESOP participants and is the sole shareholder of CIC. L.F. 2, 5.

Appellants are former policyholders of RRG, a domestic mutual insurance company. A.2. They sought intervention in the liquidation for the purpose of filing a petition alleging breach of fiduciary duty and constructive trust against ProMed, RRG, CIC, Jourdon, and the ESOP. L.F. 26-37. As two of the alleged defendants in the proposed petition, Jourdon and CIC submitted briefs in opposition to intervention below and were allowed to be heard on these issues by the trial court. *See, e.g.*, L.F. 38, 51, 67. Although the interests of Jourdon and CIC generally parallel those of the Receiver with respect to the denial of intervention

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[1]Appellants' Supplemental (Corrected) Legal File will be cited as "L.F." The Rule 84.16(b) Memorandum issued by the court of appeals on October 31, 2000 in the previous appeal (WD 57950) is an appendix to Appellants' Substitute Brief and will be cited as "A" followed by the specific page reference, *e.g.*, "A.3." The three hearing transcripts will be cited by date and page, *e.g.*, 12/20/2000 Tr. 31.

in the receivership proceeding itself, those interests diverge with respect to possible litigation of claims against Jourdon and CIC outside the receivership. Accordingly, Jourdon and CIC submit this amicus brief in order to assure that the Court has the benefit of Jourdon's and CIC's distinct perspective on the issues.

STATEMENT OF FACTS

In their brief, appellants make unsupported accusations of wrongdoing which Jourdon and CIC vigorously deny. There is no basis for attacking transactions designed to promote employee ownership of ProMed through an ESOP. *See, e.g.*, L.F. 4 (ProMed preferred stock held by RRG redeemed in a manner to return to RRG approximately $10 million in surplus originally contributed by RRG to ProMed in exchange for ProMed preferred stock; promissory notes given by ESOP and CIC in connection with purchase of ProMed common stock repaid in full with interest). Although appellants cite the court of appeals' previous opinion in WD 57950 in support of some background facts, their recitation of the alleged facts is laced with argumentative assertions made without any evidentiary support or, at most, a citation to record items that merely reflect the same unsupported allegations made below by appellants. *See, e.g.*, Appellants' Substitute Brief at 8 (citing appellants' unsigned proposed petition in intervention as the basis for various assertions). Appellants' statement of facts is therefore contrary to Rule 84.04(c) and (i) and should be discounted accordingly.

Although appellants make unsupported accusations about events that occurred a decade ago, they largely ignore the important regulatory context in which such transactions

occurred. As insurance companies, ProMed and RRG operated under comprehensive regulatory oversight. *See, e.g.*, Mo. Rev. Stat. Chapters 374 and 375 (statutes establishing Department of Insurance and requirements applicable to all insurance companies). As the court of appeals recognized in its earlier opinion in WD 57950, transactions between RRG and ProMed involved hearings and approvals by the Department of Insurance. A.3-A.4. Similarly, there is no dispute from the Receiver that the transactions appellants now wish to challenge were reviewed and approved by the Department of Insurance. 12/20/2000 Tr. 31-32. Thus, it is inaccurate for appellants to suggest or imply that any transactions involving RRG or ProMed were secret or undisclosed.

Appellants also attempt to convey the misimpression that ProMed and RRG were somehow mismanaged under the leadership of Jourdon, apparently because they were placed into receivership. For example, appellants asserted before the court of appeals that the trial court "acknowledged its belief that Appellants had 'legitimate claims'" against CIC and Jourdon. Appellants' Reply Brief at 9 (citing 12/20/2000 Tr. 29). In reality, the trial court only stated "it appeared to me that you *might have* some legitimate claims against individuals." 12/20/2000 Tr. 29 (emphasis added). The indisputable fact is that these "insolvent" insurance companies have generated tens of millions of dollars in surplus—a fact indicating the companies were well managed. *See, e.g.*, 12/20/2000 Tr. at 4-5, 12-13. That surplus has generated distributions to appellants and other RRG former policyholders many times in excess of the premiums they paid for insurance coverage. For example, the

percentage interests of appellants Wolf, Axelbank and Klein in the RRG surplus are 2.991%, 1.953% and 1.352% respectively, based on their respective annual premium payments of $12,474, $8,144, and $5,638. *See* Appendix to Receiver's Substitute Brief. Applied against the $12.5 million RRG partial distribution made in 2001 (12/20/2000 Tr. 5), these percentages mean these three RRG former policyholders have already received distributions as follows:

Wolf	$373,875
Axelbank	$244,125
Klein	$169,000

Appellants' assertions regarding the history of these proceedings are also incomplete or misleading with respect to their own delay and lack of diligence. Appellant Wolf filed a motion to intervene on October 27, 1999 without submitting any proposed petition or noticing the matter for a hearing. *See* L.F. 22-25. More than seven months later, appellant Wolf, joined for the first time by appellants Axelbank and Klein, filed a "supplemental" motion to intervene on June 8, 2000, this time accompanied by a proposed petition against ProMed, RRG, CIC, Jourdon, and the ESOP. L.F. 26-37. Once again, appellants did not request a hearing or take any steps to prompt court action on the motion.

More than four months later, on October 13, 2000, appellants first noticed a hearing on the motion to intervene. *See* Appendix A1-A2 (attached hereto). Thereafter, the court held hearings on October 30, November 13 and December 20, 2000. *See* Transcripts. At

the second hearing, the trial court expressed concern about the delay and the impact of proposed intervention on conclusion of the long-pending receivership. 11/13/00 Tr. at 20-22. More than a month later, at the hearing on December 20, 2000, the trial court reiterated its concerns about delaying the closure of the receivership estate as a significant factor in denying the motion to intervene. 12/20/00 Tr. at 29-30, 40.

POINTS RELIED ON

I. The Trial Court Correctly Denied Intervention Because The Insolvency Code Does Not Permit Intervention To Circumvent The Exclusive Statutory Claims Procedure And Because Appellants Have No Legal Right Or Interest In The Matters Raised By Their Proposed Petition In That They Failed To File A Claim In The Receivership Regarding Such Matters And Any Such Claim Is Now Barred.

In re Transit Casualty Co., 43 S.W.3d 293 (Mo. 2001).

Ainsworth v. Old Security Life Ins. Co., 685 S.W.2d 583 (Mo. App. 1985)

Ainsworth v. Old Security Life Ins. Co., 694 S.W.2d 838 (Mo. App. 1985)

Mo. Rev. Stat. § 375.1206.

Mo. Rev. Stat. § 375.1218.

II. The Trial Court Correctly Rejected Appellants' Allegations Of Conflict Of Interest By The Receiver And Request For Appointment Of A Trustee Because The Allegations Are Without Legal Or Factual Basis In That Appellants Have

No Legal Interest Adversely Affected By The Alleged Conflict And Appellants Presented No Evidence Supporting Their Allegations Of Conflict Of Interest.

Mo. Rev. Stat. § 375.1206.

Mo. Rev. Stat. § 375.710.

III. This Court Should Not Rule On The Validity Of The Receivers' Purported Assignment Of Causes Of Action To RRG Former Policyholders Because The Judgment On Appeal Does Not Rule Upon Such Assignment, Because Objections To Such Assignment Remain Pending Before The Trial Court, And Because Denial Of Intervention To Appellants Can Be Affirmed Without Regard To The Assignments Based On Appellants' Delay and Lack Of A Legal Interest Warranting Intervention.

Rule 74.01(b).

ARGUMENT

I. The Trial Court Correctly Denied Intervention Because The Insolvency Code Does Not Permit Intervention To Circumvent The Exclusive Statutory Claims Procedure And Because Appellants Have No Legal Right Or Interest In The Matters Raised By Their Proposed Petition In That They Failed To File A Claim In The Receivership Regarding Such Matters And Any Such Claim Is Now Barred (Response to Appellants' Point I).

Appellants claim that they should have been allowed to intervene to assert shareholder derivative actions against RRG and ProMed. Appellants' Substitute Brief at 19-20. A derivative claim can only be pursued after first making demand on the corporate entity. Rule 52.09. If that demand is refused, then the corporate entity must be joined as a defendant in the suit. *See, e.g., Dawson v. Dawson*, 645 S.W.2d 120, 123 (Mo. App. 1982) (derivative action by shareholders naming corporation and others as defendants). Appellants contend their proposed derivative claims give them the "interest" required to support intervention as of right. *See* Appellants' Substitute Brief at 19-20. Appellants' discussion of their "interest" to support intervention is wholly inadequate and fails to address the Insolvency Code, which is fatal to their purported interest and proposed intervention.

"This is an insurance insolvency receivership proceeding, and the provisions of Chapter 375 prevail over the common law and any general statutes because the legislature has specifically set forth the substantive law and procedures to be followed." *In re Transit Casualty Co.*, 43 S.W.3d 293, 299 (Mo. 2001). The Insolvency Code establishes the exclusive procedure for the submission and allowance or denial of claims in a receivership. Mo. Rev. Stat. §§ 375.1206-.1224. These provisions do not authorize intervention as a method for asserting claims against an insurance company in receivership; instead, any demand or claim, whether direct or derivative, must be submitted through the claims process. Mo. Rev. Stat. § 375.1206.1 ("Proof of *all* claims *shall* be filed with the liquidator") (emphasis added); *see also id.* § 375.1210 (permitting contingent claims). Moreover, the

Insolvency Code explicitly prohibits a creditor from using equitable remedies to circumvent the claim procedures and priorities. Mo. Rev. Stat. § 375.1218. Appellants here sought to do precisely that by proposing to file a petition in intervention asserting derivative claims and seeking the equitable remedy of a constructive trust. L.F. 29-37.

Appellants' reliance upon *Ainsworth v. Old Security Life Ins. Co.*, 685 S.W.2d 583 (Mo. App. 1985) ("*Ainsworth I*") and *Ainsworth v. Old Security Life Ins. Co.*, 694 S.W.2d 838 (Mo. App. 1985) ("*Ainsworth II*"), is misplaced for several reasons. *Ainsworth I* stands for the proposition that there is no right of intervention under Rule 52.12(a) "in a *receivership,* as opposed to . . . ancillary proceedings." 685 S.W.2d at 585 (emphasis in original). The court in *Ainsworth I* rejected the notion of "plenary intervention in the receivership", at least in part because "[i]t would too much encumber the receivership proceeding." *Id*. at 585, 586. By their motion to intervene, appellants sought a roving commission to allow them, or a trustee, to reopen matters previously decided, to pursue claims already barred, and otherwise to rearrange the affairs of the receivership for their benefit—just as the receivership was winding down. Although the court in *Ainsworth I* remarked at the end of its opinion that a stockholder's derivative action "may also be available to a stockholder of the insolvent insurance company," the court did not consider how such a derivative action might be reconciled with the claims process or the role of the receiver, nor did the court indicate that intervention would be allowed for the purpose of commencing a derivative action as part of the receivership. *Id*. at 587.

Ainsworth II illustrates how intervention may be allowed to a claimant with a recognized interest in a receivership for purposes of responding or objecting to proposed action that would directly diminish the fund that would otherwise come to the sole shareholder of the insurance company in receivership. Prior intervention by CIC and Jourdon as Class 9 claimants is entirely consistent with this approach. A.6 (CIC and Jourdon "filed an application to intervene for the purpose of *responding* to the issues raised in Receiver's application for declaratory judgment") (emphasis added). By contrast, appellants are only three of 105 RRG members and any rights they may have are limited to any remaining RRG assets; they have never been recognized as having any interest in ProMed. Their eleventh-hour assertion of some entitlement to ProMed assets involves a double derivative analysis, first through RRG and then to ProMed. This is scarcely the "direct and immediate interest" found sufficient to support intervention in a limited proceeding in *Ainsworth II.* 694 S.W.2d at 840. Moreover, nothing in *Ainsworth II* or any other case suggests that intervention can be used as a vehicle to circumvent the claims procedure and seek recovery on affirmative claims by some other means. Instead, the Insolvency Code dictates that whatever claim or demand appellants wished to assert regarding an insurance company in receivership must be channeled exclusively through the claims process, which shall not be circumvented by intervention or any other procedural device. Mo. Rev. Stat. § 375.1206.1; *id.* § 375.1218.

The Insolvency Code further refutes appellants' claim that they have an interest supporting intervention because, even assuming appellants ever had any right to assert their proposed claims, their claims are clearly time barred under the Insolvency Code. In particular, section 375.1206.1 requires that "[p]roof of all claims shall be filed with the liquidator in the form required by section 375.1208 on or before the last day for filing specified in the notice required under section 375.1185 . . . ." Appellants filed no claim against RRG or ProMed asserting the claims they now seek to raise by intervention. Indeed, appellants' lack of diligence can be measured in years.

This receivership has been pending since April 1994. A.5. Thereafter, appellants and other RRG former policyholders received notice of the receivership, and appellants submitted claim forms for any amounts to which they believed they were entitled. Indeed, it is by reason of those claim forms that they ultimately received distributions many times in excess of the premiums they paid. *See* A.5-A.6. Appellant Wolf's original motion to intervene in October 1999 came more than four years after the original bar date of April 7, 1995 and some ten months after the Receiver stopped accepting late-filed claims in January 1999. *See* Mo. Rev. Stat. § 375.1206; 10/30/2000 Tr. 15-16, 25. Another year then elapsed before appellants finally requested a hearing on their motion to intervene. *See* Appendix A1-A2 (attached hereto).

Accordingly, appellants allowed years to pass without taking any steps to assert or preserve their alleged rights, whether derivative or otherwise. As such, they failed to make

"timely application" for intervention as required under Rule 52.12. *See City of Bridgeton v. Norfolk & Western Ry.*, 535 S.W.2d 99 (Mo. 1976) (rejecting intervention as untimely where applicant stood by and only moved to intervene after judgment). Moreover, their purported claims were barred under the Insolvency Code no later than January 1999, when the Receiver stopped accepting late-filed claims. 10/30/2000 Tr. 25. Accordingly, appellants have no interest to support intervention.

II. The Trial Court Correctly Rejected Appellants' Allegations Of Conflict Of Interest By The Receiver And Request For Appointment Of A Trustee Because The Allegations Are Without Legal Or Factual Basis In That Appellants Have No Legal Interest Adversely Affected By The Alleged Conflict And Appellants Presented No Evidence Supporting Their Allegations Of Conflict Of Interest (Response to Appellants' Point II).

Appellants complain that the Receiver failed to protect their interests because they claim the Receiver was operating under a conflict of interest by reason of serving in the dual capacity of Receiver for both RRG and ProMed, and they seek the appointment of a trustee to reopen and reconsider actions or decisions by the Receiver. Appellants' Substitute Brief at 27-34. This allegation provides no basis for reversal for three reasons. First, as demonstrated above, appellants allowed years to pass without asserting the claims they now seek to raise by intervention. Any legal rights they may have had were long ago terminated by operation of the Insolvency Code and bar date. Mo. Rev. Stat. § 375.1206. There can be

no harm from the purported conflict of interest when appellants have no interest to protect. The court of appeals previously rejected allegations of conflict of interest under Mo. Rev. Stat. § 375.710 against the ProMed/RRG Receiver for essentially the same reasons: "Receiver did not have a conflict of interest because, as previously discussed, ProMed did not have a valid claim against the assets remaining in RRG after satisfaction of Class 2 through 8 claims." A.13. In reaching that conclusion, the court noted that no proof of claim had been filed with the RRG receiver for the amounts in question. A.9.n.4. The same result should apply here because appellants never filed a proof of claim against RRG or ProMed for the matters they seek to raise by intervention.

Second, as the trial court specifically noted in rejecting appellants' allegations of conflict of interest, "I don't have that presented to me on any kind of an evidentiary basis. I have no basis for making that determination and I am not going to make it." 12/20/00 Tr. at 30-31. Having supervised the RRG/ProMed liquidation for nearly seven years, the trial court was well aware of the Receiver's dual status, had reviewed the Receiver's various decisions and concluded no conflict of interest was present. As the court of appeals noted in its earlier opinion in WD 57950, "the supervising court recognized the separateness of the two entities throughout the liquidation. In its order of liquidation, the court made separate findings of insolvency with respect to each company, and in its subsequent rulings and orders, the court treated the companies as separate and distinct estates." A.9. Appellants

presented no contrary evidence or any evidence to suggest that the Receiver had acted contrary to their interests by reason of a conflict of interest.

Finally, appellants' allegations of conflict of interest are untenable in the context of these long-pending receivership proceedings. In essence, appellants are contending that the Receiver favored the interests of ProMed and its stockholders (CIC and the ProMed ESOP, including Jourdon) over the interests of RRG policyholders. There is absolutely no evidence of any Receiver favoritism toward CIC or Jourdon; indeed, Jourdon and CIC contended in the prior appeal in WD 57950 that the Receiver had taken actions adverse to their interests (and in favor of RRG former policyholders, including appellants). A.13. Throughout these proceedings, the Receiver has repeatedly made decisions and taken actions that are adverse to the interests of Jourdon and CIC—commencing with the decision to place the companies in liquidation. The Receiver whom appellants now attack for conflict of interest is the same Receiver who determined that RRG former policyholders—rather than ProMed and its shareholders—should receive millions of dollars, a result which has already produced distributions in excess of $750,000 to these three appellants. *See* A.5-A.6.

III. This Court Should Not Rule On The Validity Of The Receivers' Purported Assignment Of Causes Of Action To RRG Former Policyholders Because The Judgment On Appeal Does Not Rule Upon Such Assignment, Because Objections To Such Assignment Remain Pending Before The Trial Court, And Because Denial Of Intervention To Appellants Can Be Affirmed Without

Regard To The Assignments Based On Appellants' Delay and Lack Of A Legal Interest Warranting Intervention.

On December 21, 2000, the RRG Receiver assigned to 105 RRG former policyholders (including these three appellants) causes of action allegedly belonging to RRG and held by the Receiver against Jourdon and CIC arising from the operation and management of RRG and the sale or transfer of RRG assets to CIC. *See* Appendix to Receiver's Substitute Brief. The assignment occurred some fourteen months after appellant Wolf moved for intervention and after the trial court denied intervention, so appellants obviously do not rely on the assignment as a basis for such intervention. Both before the trial court and again on appeal, appellants instead assert the assignment is illusory, unworkable or otherwise unacceptable. Appellants' Substitute Brief at 26-27; 11/13/2000 Tr. 8; 12/20/2000 Tr. 17.

Shortly after the commencement of this appeal, Jourdon and CIC filed objections to the assignment on various grounds, and those objections remain pending before the trial court, which never issued an order authorizing the assignment of causes of action. *See* 12/20/2000 Tr. 30 (trial court expressing view that Receiver can grant assignment on his own terms without court approval). Generally stated, Jourdon and CIC contend that the purported assignment is contrary to the Insolvency Code, which contemplates that such causes of action shall be pursued, if at all, only by the Receiver under the supervision and direction of the receivership court. *See*, *e.g.*, Mo. Rev. Stat. § 375.1182.1(12) and (13); L.F. 69-72.

The order denying intervention does not rule upon the Receiver's assignment, which is therefore outside the scope of issues on this appeal. Rule 74.01(b); L.F. 83 ("This Judgment constitutes the final judgment of the Court *with respect to the matters addressed herein* . . . .") (emphasis added). Thus, this Court should dispose of this appeal without passing on the validity of the purported assignment of causes of action or otherwise prejudicing the objections pending before the trial court. The only question presented on this appeal is whether the trial court properly denied appellants' motion to intervene, and that ruling should be affirmed based on the exclusive provisions of the Insolvency Code, appellants' failure to demonstrate any interest supporting their proposed intervention, and appellants' delay. Any issue regarding the validity of the Receiver's purported assignment of causes of action should be left for the trial court to resolve in the first instance following the conclusion of this appeal.

CONCLUSION

Appellants have shown no legal or factual basis for intervention or for displacing the Receiver based on a purported conflict of interest. Appellants' quest for intervention is in effect an eleventh-hour attempt to reopen and relitigate the allocation of surplus assets between ProMed and RRG—a matter which was determined in 1999 and is now finally adjudicated and closed. *See City of Bridgeton*, 535 S.W.2d 99 (rejecting post-judgment application to intervene as untimely). This receivership has been pending for more than eight years, and appellants had literally years in which to assert the claims which they attempted to raise at the last minute. Any such purported rights or claims are now foreclosed by the Insolvency Code. It is therefore time to promote the expeditious resolution of the liquidation, as contemplated by statute. Mo. Rev. Stat. § 375.1222.

Accordingly, the judgment denying intervention to appellants should be affirmed.

Respectfully submitted,

LATHROP & GAGE L.C.

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R. Kent Sellers #29005
2345 Grand Boulevard, Suite 2500
Kansas City, Missouri 64108
(816) 292-2000 FAX: (816) 292-2001

James P. Dalton
314 East High Street
Jefferson City, Missouri 65101
(573)634-3411 FAX: (573) 634-8818

Attorneys for Corporate Insurance Consultants, Inc. and Glenn Jourdon

RULE 84.06(c) CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Supreme Court Rule 55.03;

2. The brief complies with the limitations contained in Supreme Court Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Word Perfect Version 8), the brief contains 4,356 words; and

4. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

R. Kent Sellers

CERTIFICATE OF SERVICE

On this 3rd day of July 2002, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by hand delivery, to:

Martin M. Meyers
The Meyers Law Firm, LC
222 West Gregory, Suite 340
Kansas City, MO 64114
Attorney for Appellants

Bruce E. Baty
Morrison & Hecker L.L.P.
2600 Grand Avenue
Kansas City, MO 64108
Attorney for Respondent

and by first-class mail, postage prepaid, to:

Angela K. Green
Lowther Johnson Attorneys at Law, LLC
901 St. Louis Street, 20th Floor
Springfield, MO 65806
Attorney for Certain ESOP Participants

_____

Attorney for Corporate Insurance Consultants, Inc.
and Glenn Jourdon

APPENDIX